

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

KIERAN D.,

Claimant,

vs.

WESTSIDE REGIONAL CENTER,

Service Agency.

OAH No. 2011040533

**DECISION**

Howard W. Cohen, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on June 7, 2011, in Culver City.

Kieran D. (claimant) was not present; he was represented by his mother, Cammy D.<sup>1</sup>

Lisa Basiri, Fair Hearing Coordinator, represented Westside Regional Center (WRC or Service Agency).

Oral and documentary evidence was received, the record was closed, and the matter was submitted for decision on June 7, 2011.

**ISSUE**

Whether the Service Agency may eliminate claimant's 14 hours per month of in-home respite at the sibling rate, leaving him with 14 hours per month of in-home respite at the individual rate.

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<sup>1</sup> Initials and family titles are used to protect the privacy of claimant and his family.

## EVIDENCE RELIED UPON

*Documents:* Service Agency's exhibits K1-K12; claimant's exhibits KA-KB.

*Testimony:* Lisa Basiri; Cammy D.

## FACTUAL FINDINGS

1. Claimant is a 13-year-old boy, born on July 14, 1998, who is a consumer of WRC based on his qualifying diagnosis of autism.

2. Claimant lives at home with his parents and his brother and sister; his brother is also a consumer of WRC's services. Claimant attends a public middle school where he receives the services of a one-on-one aide.

3. In 2009, the Service Agency notified claimant's parents that it was suspending funding for "program respite services" for claimant at a swim school under Welfare and Institutions Code section 4648.5.<sup>2</sup> Claimant's parents filed a fair hearing request and, during the subsequent informal conference, discussed with Erica Reimer, M.A., WRC's Executive Director Designee, their need for respite services. By letter dated November 9, 2009, Ms. Reimer informed claimant's parents that WRC would not continue funding the swim school services and offered WRC funding for 14 hours per month of in-home respite services at the individual hourly rate until July 30, 2010. Shortly thereafter, WRC and claimant's parents agreed that WRC would fund in-home respite services at the individual hourly rate from December 1, 2009, through November 30, 2010; respite services at the sibling rate were to expire on December 31, 2009. (Ex. K-4.)

4. Claimant's July 9, 2010, individual program plan (IPP), signed by claimant's mother, claimant's service coordinator, and a WRC supervisor, retained the individual-rate respite services timeframe, and extended the sibling-rate timeframe, as follows:

### *Plan for WRC Supports:*

2.3 WRC is funding 14 hours (sibling rate) via [P]remier from 01/01/10 to 12/31/10[.] Services to continue per parents request and WRC service standards.

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<sup>2</sup> "Program respite" is a term that WRC uses to characterize a variety of services obtained through approved vendors; it does not necessarily refer to "respite services" as that term is defined in the Lanterman Developmental Disabilities Services Act (Lanterman Act).

2.4 WRC is funding 14 hours (single rate) of in home respite via Premier from 012/10/09 to 11/30/10, from fair hearing resolution. Services to continue per parents request and WRC service standards.

2.5 WRC is funding Specialized Supervision, Monday through Friday, 44 hours per month, from 07/01/09 to 09/30/10. Services to continue per parent's request and WRC service standard guidelines.  
(Ex. K-6.)

5. The IPP states that claimant is able to tend to his self-care needs at home with some supervision, that he has "adjusted well to his school," and that he is popular. It also states, however, that claimant requires the assistance of an aide at school in order to "stay focused, control outbursts, and to motivate him to stay on task," and that he has difficulty with transitions, becomes "obsessed with an item, task, or event," and "requires nearby supervision as he is not always aware of the dangers in the home or out in the community."  
(*Id.*)

6. By Notice of Proposed Action (NOPA) dated March 29, 2011, and by letter dated March 24, 2011, WRC notified claimant's mother of its proposal to eliminate funding for in-home respite services at the sibling rate, while continuing to fund 14 hours per month of in-home respite services at the individual rate of \$14.14 per hour, effective May 1, 2011. In the NOPA, WRC wrote that "[C]laimant's needs do not exceed 14 hours of respite in accordance with WRC service standards." (Ex. K-2.) In the letter, WRC reiterated that its decision was "based upon WRC service standards," and stated that it would continue to fund specialized supervision for claimant.

7. On or about April 8, 2011, claimant's parents submitted to WRC a Fair Hearing Request on claimant's behalf, appealing the proposed reduction in funding. The stated reason for the request was:

Circumvention of Claimant's right to due process and not following agency procedures. WRC has unilaterally changed material terms of the IPP without knowledge and have [sic] attempted to reduce needed services without taking into consideration needs of Consumer or amounts parents continue to spend on childcare and monitoring.  
(Ex. K-2.)

8. WRC has continued to fund 28 hours of respite services for claimant per month, 14 hours at the individual rate and 14 hours at the sibling rate, pending the decision in this matter.

9. By letter dated May 4, 2011, after an informal meeting on April 29, Mary E. Rollins of WRC notified claimant's parents that the Service Agency was upholding the decision to terminate 14 hours of in-home respite per month at the sibling rate, effective June 1, 2011, citing an absence of exceptional circumstances and the fact that "[claimant's]

abilities and behavior fit the criteria for fourteen (14) hours per month. I strongly recommend that you follow through with an application for In Home Support Services; I do believe that [claimant] will be eligible for some hours.” The letter also explained that, at the July 2010 IPP, funding had been approved only through December 2010 and not through June 30, 2011, because:

[w]hen the funding requests were submitted in July 2010 it was realized that excessive services were in place. In order to sort through what was appropriate funding and to not disrupt services without adequate notice it was decided to only fund through February 2011.  
(Ex. K-3.)

10. Claimant’s mother argued that the Service Agency has unilaterally changed the terms of the IPP without sufficient notice. She testified that the Service Agency has not assessed claimant since the July 2010 IPP and that claimant’s behavior has become more problematic since then; he is “spiraling and bolting,” and she has concerns for his safety. She further testified that she has applied for IHSS and that her application is pending. Claimant’s father stated by declaration that claimant “requires constant supervision and assistance in his daily activities.” (Ex. K-A.)

## DISCUSSION

### *Jurisdiction and Burden of Proof*

1. The Lanterman Act governs this case. (Welf. & Inst. Code, § 4500 et seq.)<sup>3</sup> An administrative “fair hearing” to determine the rights and obligations of the parties is available under the Lanterman Act. (§§ 4700-4716.) Claimant’s parents requested a fair hearing to appeal the Service Agency’s proposed reduction of funding for claimant’s in-home respite services. Jurisdiction in this case was thus established. (Factual Findings 6-8.)

2. The party asserting a claim generally has the burden of proof in administrative proceedings. (See, e.g., *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9.) In this case, the Service Agency seeks to change the level of services. Therefore, the Service Agency bears the burden of proving, by a preponderance of the evidence, that its decision to reduce claimant’s in-home respite service hours is correct. (Evid. Code, § 115.)

### *Funding for Claimant’s Respite Services*

3. The Lanterman Act acknowledges the state’s responsibility to provide services and supports for developmentally disabled individuals and their families. (§ 4501.) Regional centers, such as the Service Agency, play a critical role in the coordination and delivery of

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<sup>3</sup> Statutory citations are to the Welfare and Institutions Code, unless otherwise stated.

services and supports. (§ 4620 et seq.) Regional centers are responsible for developing and implementing IPPs, for taking into account consumer needs and preferences, and for ensuring service cost-effectiveness. (§§ 4646, 4646.5, 4647, and 4648.)

4. Section 4512, subdivision (b), provides, in pertinent part, that respite is one of the services that may be provided to consumers and their families. “In-home respite services” are defined in the Lanterman Act as “intermittent or regularly scheduled temporary nonmedical care and supervision provided in a client’s own home, for a regional center client who resides with a family member.” (§4690.2, subd. (a).) Subdivision (a) of section 4690.2 provides that respite services are designed to:

- (1) Assist family members in maintaining the client at home.
- (2) Provide appropriate care and supervision in maintaining the client at home.
- (3) Relieve family members from the constantly demanding responsibility of caring for the clients.
- (4) Attend to the client’s basic self-help needs and other activities of daily living including interaction, socialization, and continuation of usual daily routines which would ordinarily be performed by family members.

5. Effective July 1, 2009, section 4686.5 was added to the Lanterman Act, limiting a regional center’s ability to purchase respite care for the families of consumers. Among other things, section 4686.5 provides that “[a] regional center may only purchase respite services when the care and supervision needs of a consumer exceed that [sic] of an individual of the same age without developmental disabilities.” (§ 4686.5, subd. (a)(1).)

6. When purchasing services and supports, a regional center must conform to its purchase-of-service guidelines. (4646.4, subd. (a)(1).) Those guidelines are to have been reviewed by the Department “to ensure compliance with statute and regulation.” (§ 4434, subd. (d).) Reflecting the Department’s interpretation of statute and regulation, the guidelines are not entitled to the deference given to a regulation but are rather entitled to a degree of deference dependent upon the circumstances in which the agency has exercised its expertise. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12-15.) The Service Agency in this case relied on its service standards, and in particular on its Respite Guidelines, to justify the proposed reduction in respite hours. The guidelines provide that the Service Agency “may only purchase respite services when the care needs of the individual exceed those of a person of the same age without a developmental disability.” (Ex. K-10). This language mirrors almost exactly the language of section 4686.5, subdivision (a)(1).

7. Applying its guidelines, the Service Agency concluded that claimant’s care and supervision needs exceed those of a child of the same age without disabilities to the extent that only 14 hours per month of respite at the individual rate is sufficient. At hearing, however, the Service Agency did not provide evidence sufficient to demonstrate its grounds for arriving at that conclusion, while statements in the July 2010 IPP regarding claimant’s needs and testimony at hearing about recent changes in claimant’s behavior do not appear to

support that conclusion. (Factual Findings 2-10.) The Service Agency has, therefore, failed to meet its burden to demonstrate that the reduction of respite hours is justified.

8. Under the Lanterman Act, a regional center must give a consumer 30 days' notice prior to deciding, without the consumer's consent, to reduce, terminate, or change services set forth in an IPP. (§ 4710, subd. (a)(1).) Adequate notice must be in writing and include the specific law, regulation, or policy that supports the action. (§ 4701, subd. (d).) A consumer dissatisfied with the proposed action may then request a fair hearing. (§ 4710, subd. (a).) An administrative law judge's review of a proposed reduction of services is thus framed by the underlying notice provided by the regional center and the fair hearing request. The Service Agency provided adequate notice in this case that sibling-rate respite services were to terminate in accordance with service standards. (Factual Finding 6.)

9. Under the Lanterman Act, regional centers may not purchase services for their clients when those services can be provided by a generic agency, an agency that has a legal responsibility to serve members of the general public and that receives public funds for providing such services. (See §§ 4648, subd. (a)(8), 4659, 4646, subd. (d), 4646.4, subd. (a), 4646.5, subd. (a)(4), and 4647, subd. (a).) IHSS may be considered a generic resource when the approved IHSS service is consistent with a specific service need identified in the client's IPP; however, respite hours purchased by regional centers should be considered as an offset only when there is a clear determination by the interdisciplinary team that the specific IHSS services are meeting "the respite need as identified in the consumer's [IPP]." (§ 4686.5, subd. (a)(5); Service Agency's Respite Guidelines, at Ex. K-10.) Here, claimant's parents have applied for but have not yet received a determination regarding IHSS hours for claimant, so no determination could be made by the Service Agency that IHSS services will meet the respite needs identified in claimant's IPP. The evidence, however, does not show that the Service Agency based its determination to reduce respite hours on the availability of IHSS; the Service Agency simply recommended that claimant's parents pursue IHSS, which they are doing. (Factual Finding 9.)

## LEGAL CONCLUSION

Cause was not established to eliminate claimant's 14 hours per month of in-home respite at the sibling rate, leaving him with 14 hours per month of in-home respite at the individual rate. (Factual Findings 1-10, and Discussion.)

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ORDER

Claimant Kieran D.'s appeal is granted.

DATED: August 2, 2011

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HOWARD W. COHEN  
Administrative Law Judge  
Office of Administrative Hearings

NOTICE

**This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.**